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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANKIE LEE BROWN, Defendant and Appellant.	G050028 (Super. Ct. No. 13NF1373) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Sabrina Y. Lane-Erwin and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Frankie Lee Brown not guilty of the two counts with which he was accused in the information: pandering (Pen. Code, § 266i, subd. (a)(2); count 1)[1] and attempted pimping (§§ 266h, subd. (a), 664, subd. (a); count 2). But the jury found defendant guilty of attempted pandering as a lesser included offense of pandering (§§ 266i, subd. (a)(2), 664, subd. (a)). In a bifurcated proceeding, the court found true: (1) an allegation that defendant had suffered a prior burglary conviction, a serious or violent felony (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)); and (2) an allegation that defendant served a prison term on the same burglary prior (§ 667.5, subd. (b)). The court sentenced defendant to four years in state prison.

On appeal, defendant contests the sufficiency of the evidence supporting his attempted pandering conviction. Defendant also contends the court erred when it denied his motion to exclude from evidence statements he made to police before he was provided with *Miranda* warnings.[2] We requested and received briefing on a third issue: Did the court prejudicially err by instructing the jury that they could convict defendant of attempted pandering? We reject each of the three contentions of error and affirm the judgment.

FACTS

The criminal allegations against defendant arose as a result of a police sting operation in April 2013. Police officers, pretending to be a prostitute named "Jessica," communicated via text messages and phone calls with defendant over the course of several days. The sting operation culminated with defendant arriving for a supposed

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[1] All statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

meeting with Jessica at a motel, at which time defendant was questioned and ultimately arrested.

The only witnesses at trial were police officers who had played various roles in the sting operation. Other evidence included reports detailing text messages exchanged between police and defendant and transcripts of phone calls between police and defendant. We set forth key evidence for purposes of evaluating the substantial evidence challenge to defendant's conviction of attempted pandering.

Defendant made statements that reasonably could be interpreted as admissions that he was a pimp. In a phone conversation with Jessica, defendant stated, "I'm not into hitting on females that's not my . . . I ask you to leave and get away from you before I hit you. I mean so [i]f that's what you been through I apologi[ze] for the nigga that did that to you . . . but hitting somebody or hitting a female . . . is not my thing. Ya know what I mean I'm not really like a pimp uh . . . should I say like the average pimp ya know what I mean like I don't get down like them niggas get down like ya know what I mean that's not my get down."[3] On his Facebook page, defendant boasted about his skills as a pimp and stated a person would be a better pimp if he did not have sex with his prostitutes. The Facebook page also stated, "Check played to my pimps out there. If yo only plan is to break a bitch, you got no vision to give her or some legit grind, you can lose your bitch soon. Upgrade you game and learn to invest." Expert testimony explained that defendant's Facebook page was consistent with pimp culture and communicated to prostitutes that he was better than a typical pimp.

In response to text messages from Jessica about using pictures she sent to defendant to "post" on the Internet, defendant replied, "U posted already . . . calm down ms lady." Jessica challenged this statement; defendant responded, "But u want to know whats funny . . . im posting u on suga daddy sites but when u showing up"? Expert

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[3] A pimp's "get down is his hustle," i.e., "the way he or she pimps."

testimony explained that, in the patois of pimps and prostitutes, to "post" referred to advertising prostitution services online at selected Web sites. Sugar Daddy Web sites, while often purporting to offer escort services, commonly serve as a front for prostitution services.

In a phone conversation, Jessica asked whether defendant could put her in the "local spots." Defendant responded, "I mean I can post you in but . . . most my shit is online like motha-fuckas fly in for the girls ya know what I mean most motha-fuckas flyin in and they suga daddies ya know what I mean . . . ." In another phone conversation, defendant discussed his knowledge of various prostitution sites in Orange County, one of which he rejected as "dopes row," a place where drug addicts committed acts of prostitution for low rates to obtain their next "fix."

In other text messages, defendant provided instructions to Jessica for purchasing a "GreenDot money pack" to send defendant money so he could post her profile on Backpage. Expert testimony confirmed pimps commonly require prostitutes to provide money for services (including to set up a page on Backpage, a popular site for prostitution services) and pimps often use services like GreenDot, a money transfer firm. In a phone conversation, defendant represented he would split all profits with Jessica evenly (although the source of those profits was vague).

Throughout the communications, Jessica referred to defendant as "daddy." In another series of messages, Jessica described the money she was making for performing sex acts (e.g., $40 for "bj," $200 for a "greek"). Expert testimony confirmed "daddy" is a title often conferred by prostitutes on their pimps, and that "bj" refers to fellatio and "greek" refers to anal intercourse. Defendant had no objection to being called daddy. He commented with regard to the $40 that "they" pay less in Long Beach. Defendant cautioned Jessica to "lay low" when she reported a police patrol. He also made favorable statements (i.e., "Gud gurl," "You got that golden look, beautiful") following reports of Jessica receiving money for sex acts. When told Jessica had lost

much of her money due to an arrest, defendant responded, "This is a set back . . . we need to go foward . . . u need to gt here with me."

Citing the foregoing and other evidence, an expert witness opined that defendant's communications with Jessica were not consistent with someone involved in a legitimate business (e.g., a true escort business, or a lingerie/sex toys business). It is common for pimps to woo prostitutes via text message, phone call, or other electronic media.

Eventually, defendant selected a motel as a place to meet Jessica and receive money from her. A text message from Jessica told defendant to pick up an envelope containing $200 and a room key at the front desk of the motel. Defendant did so, and walked to the room. Two police officers met defendant outside of the motel room, at which point defendant consented to a search of his phone. Defendant did not make any direct admissions of guilt to the officers. But he responded to questioning with untrue and evasive answers to questions about the messages appearing in his phone (e.g., they were not from Jessica but from a male friend) and the envelope with $200 (it was from his sister and had to do with defendant's lingerie and sex toy business).

DISCUSSION

Sufficient Evidence Supports Finding Defendant was not in Custody

Appealing the denial of a pretrial motion, defendant argues pre-*Miranda* warning statements he made to the police at the motel should have been inadmissible.

The trial court concluded defendant was not in custody at the time he made the challenged statements. *Miranda* warnings must be provided once a suspect is taken into custody. (*People v. Huggins* (2006) 38 Cal.4th 175, 198.) The standard for determining whether a suspect has been taken into custody is an objective inquiry into the totality of the circumstances: "Would a reasonable person interpret the restraints used by

the police as tantamount to a formal arrest?" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.) Pertinent factors include "(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning." (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*Pilster*, at pp. 1403-1404.)

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.) The first inquiry is factual and subject to the deferential substantial evidence standard; the second inquiry is legal and subject to de novo review. (*Ibid.*)[4]

We turn to the circumstances in which defendant made the statements at issue. Defendant approached motel room 121 and knocked. The exterior of room 121 was in a publicly accessible area, near a street. Two police investigators, Mark Brydges and Catalin Panov, approached defendant from opposite directions. Though not dressed in uniforms, both investigators wore gun belts and black vests with the word "Police" on

[4] Defendant did not testify or call nonpolice witnesses to testify. The testimony of the three police officer witnesses was largely consistent.

the front and back. Panov, holding a gun with the barrel pointed down, approached defendant. Within seconds, Panov returned the gun to the holster. Panov told defendant to either put his hands behind his back or lie on the ground while he was being patted down for weapons. Brydges was the "cover officer," making sure Panov was safe. Defendant was not placed in handcuffs or told he was under arrest.

Within a minute or two, Investigator Shane Carringer arrived. He was also wearing a vest with "Police" written on the front and back, a gun belt, and a badge. Defendant was leaning against the outside of the building. At some point, defendant was sitting down. Carringer began interacting with defendant.

An audio recording (lasting almost 15 minutes) and transcript of this interaction were admitted into evidence. The audio recording reveals that Carringer's voice was calm and conversational, but the questioning was at times accusatory ("It looks like you're pimping your, your friend J. Kool") and incredulous ("What's going on dude let's be honest? Let's just cut to the chase dude are you pimping this girl out?"). Defendant's voice was also calm and friendly, though somewhat exasperated. Both defendant and Carringer referred to defendant's seeming bad luck in running into police again. There were also long pauses in the conversation when Carringer pointed out inconsistencies in the statements defendant was making. Carringer told defendant at the beginning of the conversation that he was not under arrest. But Carringer did not inform defendant he was free to leave. Had defendant actually attempted to walk away, Carringer would have prevented him from doing so (but this eventuality did not occur). During the interview, Carringer was within four to five feet of defendant, and Panov and Brydges were within five to 10 feet of defendant.

Carringer first asked about a missing juvenile; defendant insisted he had no knowledge of her whereabouts and had received no messages from her.[5] Defendant then consented to a request to inspect his phone. The inspection of the phone was followed by defendant making a series of untrue responses to questions about the messages on his phone and the source of the envelope with $200. Defendant did not make any admissions that would qualify as evidence of pandering; instead, he exhibited a consciousness of guilt by offering implausible lies about the messages on his phone and his presence at the motel with an envelope containing $200. Defendant was placed in handcuffs and read his *Miranda* warnings at the conclusion of the taped interview.

The following factors, some explicitly found to be true by the court, are cited by defendant in support of his argument that he was in custody: he was approached by an officer shouting "police" with a gun drawn out of its holster; defendant was searched by at least one of the officers; defendant sat down at some point in the interview; three officers were nearby during the interview; defendant was not affirmatively told he was free to leave; defendant's phone was taken away from him at the beginning of the encounter (though with his consent) and was not returned at any point; the encounter lasted approximately 15 minutes before defendant was handcuffed and read his *Miranda* warnings; and defendant had previously been detained by officers in connection with the investigation of the missing juvenile. Though not strictly relevant to an objective inquiry, defendant also notes Carringer's subjective knowledge that defendant was not free to leave and the fact that this encounter was a preplanned sting operation in which the obvious endgame was the arrest of defendant. The police were not merely intending to question defendant.

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[5] Defendant had already been contacted on one occasion by police about the missing juvenile. Indeed, the sting carried out against defendant began as an effort to locate the missing juvenile. To be clear, the only charges against defendant in this case pertain to the fictional Jessica, not the missing juvenile.

None of these factors alone amounts to defendant being in custody as a matter of law. A suspect is not in custody merely because he or she is made subject to a temporary detention for the purpose of questioning about a crime. (*People v. Clair* (1992) 2 Cal.4th 629, 679 ["'on-the-scene questioning as to facts surrounding a crime'" is not custodial interrogation].) This is so even if it is necessary to draw a weapon on the detainee to effect the detention. (*Ibid*.; see also *People v. Thomas* (2011) 51 Cal.4th 449, 477 [use of handcuffs or locking individual in police car prior to questioning does not mean questioning was custodial interrogation].) Police officer expressions of suspicion and skepticism do not by themselves require a custody finding. (*People v. Moore* (2011) 51 Cal.4th 386, 402-403.) The length of the encounter here prior to arrest (about 15 minutes) is not dispositive. (See *United States v. Fornia-Castillo* (1st Cir. 2005) 408 F.3d 52, 64-65 [defendant handcuffed for 10-15 minutes, but not custodial arrest because interview occurred on public street and questioning was not confrontational].) Nor did defendant's arrest at the conclusion of the interview or the fact that defendant was the target of a sting operation necessarily mean he was in custody during the interview. (See *United States v. Masse* (1st Cir. 1987) 816 F.2d 805, 807, 809-810 [target of drug sting lied to agents about his vehicle following purchase of drugs; defendant not in custody because questioning occurred on public sidewalk, officers did not engage in coercion].)

As noted by the court, there are positive factors supporting the finding of a lack of custody. Carringer told defendant, who was never handcuffed, he was not under arrest. The initial display of a weapon (it is not clear from the record whether defendant even saw the weapon unholstered) and the pat down search of defendant for weapons was brief. For most of the interview, Carringer's words did not communicate to defendant that Carringer suspected him of a crime with regard to Jessica. Instead, defendant was questioned in an investigatory manner about the missing juvenile, the messages on his cell phone, and his conduct at the motel. Defendant was questioned at a site available to the public, the walkway outside the motel, and not in a confined space (such as the back

of a police car or an interrogation room at the police station). (*People v. Davidson* (2013) 221 Cal.App.4th 966, 972-973.)

We affirm the court's ruling that defendant was not subject to a custodial interrogation. The court's factual findings are supported by substantial evidence and the court correctly concluded defendant was not in custody based on those findings. Though a close case, a reasonable person would not have interpreted the encounter at issue as tantamount to a formal arrest.

Court did not Commit Reversible Error by Instructing on Attempted Pandering

Defendant was charged in count one with pandering pursuant to section 266i, subdivision (a)(2), i.e., "By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute." (*Ibid*.) Pandering "is complete when the defendant 'encourages another person to become a prostitute' by 'promises, threats, violence, or by any device or scheme . . . .' [Citation.] There is no requirement that the defendant succeed. [Citation.] Nor is there a requirement that, in selecting his targets, the panderer choose only those who present a high probability of success. Again, the focus is on the actions and intent of the panderer, not the target." (*People v. Zambia* (2011) 51 Cal.4th 965, 981-982, fn. 8 (*Zambia*).) Thus, it does not matter that the target of a pandering offense is an undercover police officer (who could never actually be induced or persuaded to become a prostitute). (*Id*. at p. 981.)

The version of CALCRIM No. 1151 provided to the jury was consistent with *Zambia*: "To prove that the defendant is guilty of pandering, the People must prove that: [¶] 1. The defendant used promises, or any device or scheme to persuade, encourage, and/or induce Jane Doe to become a prostitute; [¶] AND [¶] 2. The defendant intended to influence Jane Doe to be a prostitute. [¶] It does not matter whether Jane Doe was a prostitute already or an undercover police officer." Presumably because the

trial concluded in 2014, the instruction did not include the following optional language now part of (as of February 2015) the applicable first element for the theory of pandering with which defendant was charged: "although the defendant's efforts need not have been successful." (CALCRIM No. 1151.)

Given the law and the facts of this case, the court should not have instructed the jury with the lesser included offense of attempted pandering.[6] *Zambia, supra,* 51 Cal.4th 965 makes attempted pandering a logical impossibility in cases like the instant one. The prosecutor agreed with this sentiment in his closing argument: "Now, it's important to note he doesn't have to be successful. No where do I have to prove in any of these jury instructions that the defendant encouraged her and she actually because of the encouragement went out and did it." "But if you say, 'You know what, I don't think he did the pandering,' then you go to the second and say, 'but did he try to pander?' [¶] The reason I don't think it's important in this case is because either you think that those words were encouragement or they were promises involved in prostitution or you don't. And if they were, then he's guilty of pandering. [¶] An example of attempted pandering may be where he writes a letter. 'Dear Jane Doe. You really should be a prostitute' or 'you should charge x, y, and z.' [¶] He puts that in the mail. It never gets to Jane Doe. He tried to encourage her. He tried to pander. But she never actually received it. That would be an example of attempted pandering. It's not present here because the cops heard every statement the defendant made, so it's a completed pandering."

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[6] The notes to CALCRIM No. 1151 indicate that attempted pandering is a lesser included offense of pandering. This helps to explain the court's instructional error.

But the court instructed the jury with attempted pandering as a lesser included offense, and the jury opted to convict defendant of attempted pandering. Is defendant entitled to a reversal based on this error? No.

First, there was no objection by defendant to the court's decision to instruct on the lesser included offense of attempted pandering. Second, a reasonable jury could have (wrongly) concluded, based on the entirety of the jury instructions, that the dividing line between pandering and attempted pandering was the success of defendant's efforts. The court's error in allowing the jury the option of convicting defendant of attempted pandering thus redounded to defendant's benefit. (See *People v. Dayan* (1995) 34 Cal.App.4th 707, 717 [erroneous instruction beneficial to defendant does not provide defendant with appellate argument].) Third, "a defendant can be convicted of an attempt to commit a crime, even though the crime, in fact, was completed." (*People v. Rundle* (2008) 43 Cal.4th 76, 138, fn. 28, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see § 663.) And fourth, a jury's leniency or compromise verdict does not undermine the validity of a seemingly inconsistent verdict. (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) In light of these four factors, defendant is not entitled to a reversal of his attempted pandering conviction on the grounds that only pandering itself was possible on the facts of this case.

Sufficient Evidence Supports Defendant's Attempted Pandering Conviction

Defendant claims there is insufficient evidence in the record to show he used (or attempted to use) promises, threats, violence, or any device or scheme to encourage Jessica to become (or continue being) a prostitute. According to defendant, the evidence instead shows the police pressured defendant to establish a prostitute-pimp relationship with Jessica, but defendant did not actually make any promises (or utilize any devices or schemes) to encourage these proposals. There was no evidence defendant was an actual pimp for any real, identifiable person. There was no evidence defendant

had actually posted pictures of Jessica on any Web site. There was no evidence defendant threatened anyone or committed any violence.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Pandering under "section 266i, subdivision (a)(2), includes encouragement of someone who is already an active prostitute, or undercover police officer." (*Zambia*, *supra*, 51 Cal.4th at p. 981.)

We agree with defendant that the police initiated contact with defendant and initiated discussions about defendant acting as Jessica's pimp without any prompting by defendant.[7] We also agree with defendant that many of his statements to Jessica are ambiguous and do not establish on their face that defendant made promises to Jessica to encourage her to prostitute herself, or otherwise engaged in a scheme to encourage Jessica to prostitute herself. But, viewed in context and in light of expert testimony, many of defendant's statements can also be understood as promises, devices, and/or schemes to encourage Jessica to prostitute herself and establish a relationship with defendant as her pimp. Defendant promised to post Jessica's pictures on Sugar Daddy Web sites and to share profits evenly. Defendant demonstrated his knowledge of the business and touted his expertise, providing a reason for Jessica to come to Orange County to join defendant. Defendant showed up to the motel and collected the envelope of money. Defendant demonstrated a consciousness of guilt by lying about his proposed transactions with Jessica. A reasonable jury could find defendant guilty of attempted pandering based on the evidence described in the statement of facts.

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[7] The jury was instructed with an entrapment defense, but apparently rejected it.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.